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## **West must learn to deal with China's rise as world power**

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# INSIGHT

## A dominant role

**Xu Ze says the chief executive’s power to pick judges for cases does not undermine judiciary**

Former chief justice Andrew Li Kwok-nang recently voiced his opinions on the enactment of the Hong Kong national security law by the Standing Committee of the National People’s Congress. He argued, inter alia, that the chief executive’s power to select the judges who would deal with national security cases would be detrimental to the city’s judicial independence. To address an accusation that involves a breach of the Hong Kong Basic Law, we have to respond in line with that law.

Li establishes his arguments on three grounds. First, the judiciary is independent from the executive, thus has the power to determine which judges shall deal with national security cases. Second, the chief executive lacks experience and expertise in the selection of judges. Third, it is improper for the chief executive, as chairwoman of the Committee for Safeguarding National Security, to select judges on her own.

These three grounds may look sensible to a certain degree, but are they compatible with the political order laid down by the Basic Law? The answer is no, for the following reasons: First, the political system laid down by the Basic Law is one of executive dominance, rather than based on the principle of separation of powers.

In accordance with Articles 43 and 48, the chief executive is the head of both the Hong Kong Special Administrative Region and its government at the same time, that is, she has dual capacities, and therefore is accountable to the central government and the SAR at the same time. One of her prime duties is to implement the Basic Law and all other laws applicable to the SAR as adopted by the Basic Law, which, needless to say, shall include those set out in Annex III.

Chapter IV of the Basic Law, which sets out the SAR’s political system, has six sections. Section 1 is devoted to the roles and duties of the chief executive, while the next three sections set out the same for the executive authorities, legislature and the judiciary. This shows the chief executive is at the core of the SAR’s power structure.

According to the articles in this chapter, the chief executive is the only person who is accountable to the central government on behalf of the SAR. For this reason, the chief

executive was granted an array of powers by the Basic Law.

The chief executive is not only the head of the executive, but also the head of the SAR. The powers vested in her include that of the appointment of judges. Why would Li think such an arrangement is tantamount to executive interference with the judiciary? It is because he has established Hong Kong courts’ constitutional jurisdiction through case precedents—in other words, the power to conduct a judicial review—thereby creating the semblance of “judicial supremacy”.

These persistent misunderstandings of the SAR’s political system are a key reason Hong Kong’s executive-dominant political system has been mistakenly believed to be based on the separation of powers.

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**The composition of the judiciary is not a matter to be determined by the judiciary on its own**

The separation of powers is not within the institutional design of the Basic Law. The Basic Law is determined by the unitary nature of our state. As early as in 1987, Deng Xiaoping explicitly stated that Hong Kong’s system would not follow a Western template; it would not be based on the separation of powers. This is the fundamental principle for designing the SAR’s political system, and also a crucial legislative intent.

Second, to appoint judges is an essential power of the chief executive vested by the Basic Law. Article 48(6) provides that the chief executive shall appoint judges of the courts at all levels. This provision is so clear and concise that no one could misunderstand it. Also, Article 88 provides that the judges shall be appointed by the chief executive on the recommendation of an independent commission composed of local judges, people from the legal profession and eminent people from other sectors.

Based on these two articles, we may conclude that firstly, the power to appoint—or not to appoint—certain judges rests with the chief executive. This power is substantive rather than procedural.

Secondly, the independent commission as set out in Article 88 has a right of nomination, and the chief executive shall make the appointment based on its nominations. However, the right of recommendation should not be interpreted as the power to appoint, as the chief executive may reject the recommendation.

From this, one can see that the provisions in the national security law empowering the chief executive to appoint judges to deal with national security cases, in consultation with the Committee for Safeguarding National Security and the chief justice, are consistent with the Basic Law. When selecting judges to handle national security cases, the chief executive will choose from the pool of judges already appointed in accordance with the Basic Law, so there is no issue of other judges being appointed.

The Committee for Safeguarding National Security is an institution responsible for safeguarding national security in the SAR, supervised by, and accountable to, the central government. It is perfectly reasonable for the chief executive to consult the committee before selecting judges. Besides, the chief executive is also required to consult the chief justice, which further reflects the legislative intent of the law to respect and preserve the SAR’s judicial system. Therefore, Li can rest assured.

Li also believes that it is improper for the chief executive, as chair of the Committee for Safeguarding National Security, to select judges. We note that the US president chairs the US National Security Council, and this does not affect his power to nominate and appoint US federal judges. Here we also need to clarify that the chief executive does not select judges for specific cases. Which judge would handle a specific case is a decision to be made by the judiciary following the relevant procedures.

Third, Hong Kong’s judicial independence should not be interpreted arbitrarily. As a legal concept, judicial independence has strict connotations and implications. In Hong Kong, it is mainly reflected in Article

85 of the Basic Law, which says that the “courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions”.

To preserve Hong Kong’s judicial independence, the Basic Law has provided an array of protections, including the tenure of judges. However, that does not mean the judiciary has the right to reject reasonable curbs imposed on it by others.

The composition of the judiciary is not a matter to be determined by the judiciary on its own. The chief executive’s power to appoint judges makes this clear.

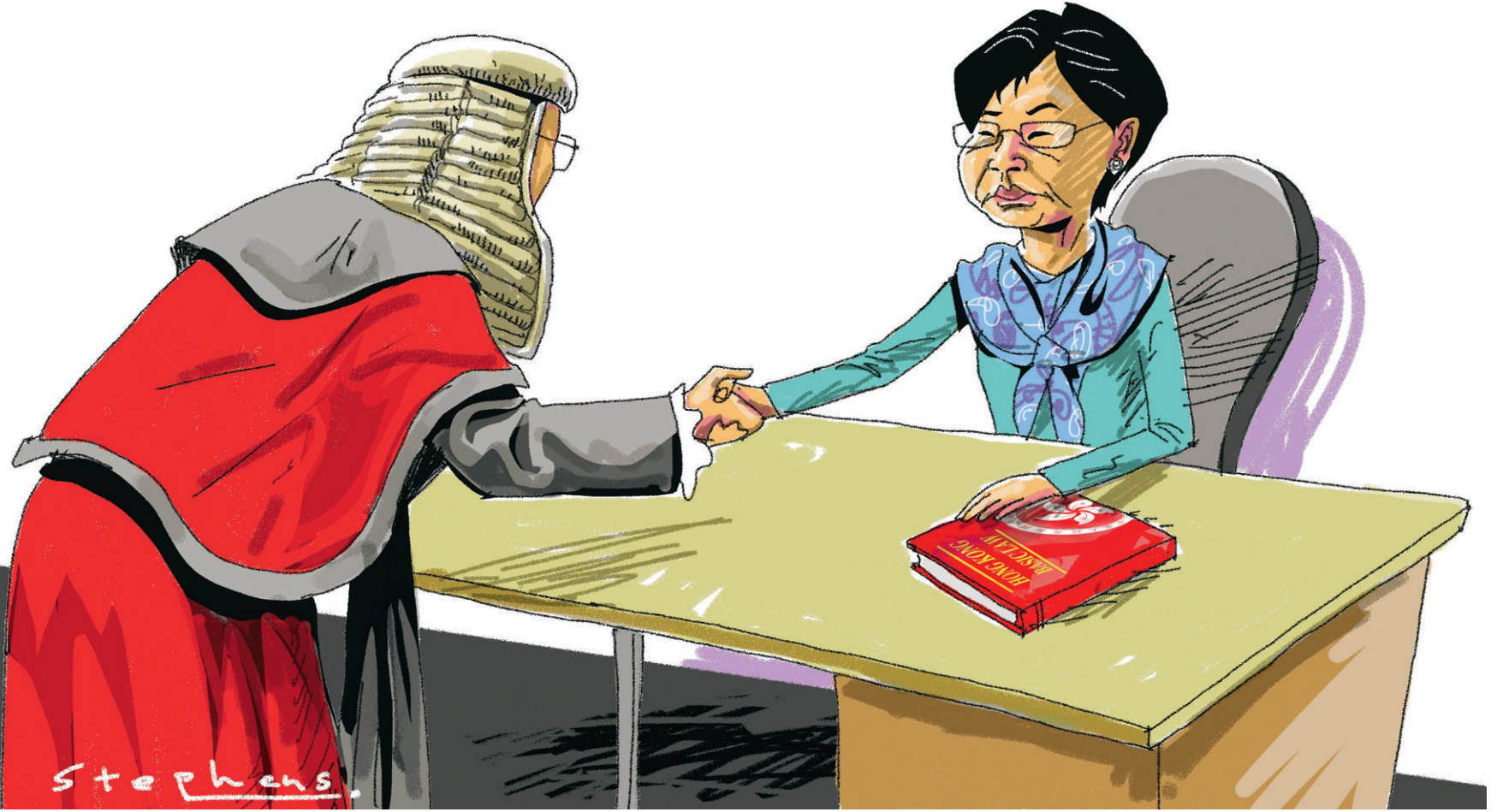
More importantly, although the Basic Law has vested Hong Kong with the power of final adjudication, its judiciary is still no more than a local judiciary, and both the scope of its jurisdiction over cases and power to interpret the Basic Law are explicitly restrained by the Basic Law.

In accordance with Article 19 of the Basic Law, the courts of the SAR shall have no jurisdiction over acts of state such as defence and foreign affairs. Also, under Article 158, the power of interpretation of the Basic Law shall be vested in the NPC Standing Committee, whose decisions are binding on the Hong Kong courts.

In conclusion, Li and others who agree with him have made these arguments because they failed to accurately understand that the constitutional order in “one country, two systems” is based on both the Constitution and the Basic Law. For the one country, two systems to continue, a precondition is to understand Hong Kong’s constitutional order and its basis.

For this purpose, it is necessary to closely study the Basic Law and the Constitution. Every person who intends to make Hong Kong home should understand the relationship between the Constitution and the Basic Law, and between the central government and the SAR. This is especially true of those who hold public office or important positions in society. I hope Li and those who agree with him could make some headway in this direction.

Xu Ze is president of the Chinese Association of Hong Kong and Macau Studies. He was formerly a deputy director of Beijing’s Hong Kong and Macau Affairs Office



## West must learn to deal with China’s rise as world power

**Li Xing says we should neither romanticise nor demonise the Chinese model of governance**

*Time* magazine’s cover on November 13, 2017 stated in both Chinese and English, “China Won”. Ian Bremmer wrote in the cover story that, “As recently as five years ago, there was consensus that China would one day need fundamental political reform for the state to maintain its legitimacy and that China could not sustain its state capitalist system. Today China’s political and economic system is better equipped and perhaps even more sustainable than the American model.”

In February, the 56th Munich Security Conference took place with a peculiar topic – “Westlessness”. It suggested a crisis of identity and existence in Western countries and a sense of uncertainty about the extent of the West’s global relevance in the age of a rising China.

While the world witnesses China-US conflicts across a range of domains, America’s fear of China’s economic competitiveness and technological advance is not the essence of the problem. Rather, it lies in the fact the outcome of China’s economic success and modernisation does not conform to a set of beliefs in the West.

These beliefs assume several presumed causal relationships in which economic modernisation leads a country into stages of secularisation, a plural society, political competition and electoral democracy. US ruling elites have never really made any effort to study how the Chinese political system is constructed and how political meritocracy, party-state dual leadership and more, actually function.

The Chinese system has a certain resilience after decades of learning and modifying. It is historically shaped and culturally unique, and is not meant to replace the Western model of liberal and electoral democracy. We should neither romanticise nor demonise the Chinese model. China’s success does not have universal relevance, but it shows that non-Western alternatives to development and modernisation do exist. Indeed, the Chinese model is a tempting option for many developing countries.

Does Westlessness also imply restlessness? Restlessness, here, refers to a sentiment of deep disappointment over the loss of a “West-like” China. It can also be called the “China syndrome”,

characterised as a mixture of psychological anxiety and emphatic demonisation.

In recent decades, either fascination or irritation with China has influenced Western scholarship and journalism. Will China be a destructive or constructive world power? A status quo or a revisionist one? A force for continuity or change?

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**The Chinese system has a certain resilience after decades of learning and modifying**

China has long been a source of fascination and opportunity. Those in the West must learn to deal with China’s rise outside the frameworks with which they are familiar and comfortable. How will the West meet the challenges ahead? Much of the answer can be found in Norwegian

Foreign Minister Ine Eriksen Soleide’s remarks to the Leangkollen Security Conference in February. Her speech was titled, “The China Challenge: Remaking the Landscape of Transatlantic Security.”

She said: “We should not overestimate China’s influence on transatlantic cohesion. But nor should we underestimate its impact on international peace and security. Power shifts bring both opportunities and challenges ... In line with its size and power, China will seek to shape international norms and institutions in its image, just as other great powers have done before it.”

She added: “Inevitably, there will be competition, disagreement and also the potential for conflicts. But I firmly believe that vigilance and engagement within the framework of a strong multilateral system is the answer. Containment, confrontation and decoupling are not.”

If the West can be guided by this kind of spirit and mindset, Westlessness will be a false consciousness and there will be no need to feel restless.

Professor Li Xing is director of the Research Centre on Development and International Relations, Department of Politics and Society, at Aalborg University, Denmark

## Australia should try to rebuild its China relations

**Kyri Theos says Canberra can forge areas of cooperation with Beijing and work together on issues such as trade and climate change, and at the same time showcase the country’s values**

China and Australia are very different nations. Normally, we put our differences aside because of the overwhelming economic benefits, but now we are at a stalemate. China’s investment in Australia has dropped 60 per cent.

Recent reports of cyberattacks and political interference in Australia have exacerbated anti-China sentiment, feelings that were already soured by Covid-19, barley tariffs and the politics of Hong Kong.

In China, public opinion towards Australia has also turned negative. Australia’s call for an investigation into the origins of Covid-19 was poorly received. It reinforced a view of Australia as a US lackey.

China’s economy is reopening, and there are serious challenges for those of us seeking to reignite China-Australia trade. At the Australian Chamber of Commerce in West China, the situation is difficult and complex. We are trying to get back to business, but statements at senior levels continue to inflame tensions and strain the relationship.

How can we sustain strong economic ties in a tense political climate? Australia can look to Japan as an example. Despite historical and territorial grievances, Japan has managed to balance its economic relations with China and its strategic ties to the United States.

Japan provided significant aid to China at the outset of the pandemic, including protective equipment. This was warmly welcomed by the Chinese people.

Diplomatic signals of goodwill can slowly begin to shift the popular narrative within China. This narrative is especially important for a country like Australia. Many of our exports to China are fuelled by discretionary purchases, including tourism, education and food products. A positive view of Australia among the Chinese people supports our export industries.

This doesn’t mean we need to compromise our values. We won’t agree on human rights. We won’t agree on Hong Kong or the South China Sea. We can build areas of cooperation with China, though. We can work together on climate change, trade and disaster management.

Australia’s competitive strength is its clean, natural environment, its high-quality education system and its exceptional quality of life. These assets are attractive in China. They are a soft form of power that can be the basis of deeper engagement with the Chinese people.

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**Students who come to Australia can return home with new ideas and a totally different world view**

A recent *Global Times* survey ranked Australia as the most desirable study destination for Chinese students. Last year, more than 200,000 Chinese students studied in Australia. This represents a unique opportunity to shape the ideas of the Chinese middle class. Students who come to Australia can return home with new ideas and a totally different world view.

Australia’s influence depends on the relationships these students form with us locally. Relationships at the individual level help us grasp the nuance and realities of life in our respective nations. They also help us recognise our own preconceptions.

At the macro level, China looks like an expansive new superpower, but viewed only through this perspective minimises the lived experience of most mainlanders: people who work long hours in difficult jobs, live in cramped and polluted environments away from their families.

If we really want to change the narrative, we must showcase the egalitarian values at the heart of the Australian character. Once it is safe to do so, Australia could extend its proposed travel bubble beyond New Zealand to also encompass China. This would send a signal that Australia wants to move past this tense period towards better relations.

More urgently, China is bracing for further widespread and severe flooding. Australia has developed significant expertise in flood management through its experience of the 2011 Queensland floods. Offering support and equipment will be interpreted as a gesture of kindness and a signal that the worst of the relationship is behind us. It is also the right thing to do.

Decades of engagement have seen our two nations prosper. Australia should take the lead and seek opportunities to re-engage, both to deepen its influence and safeguard its economic future.

Kyri Theos is general manager at the Australian Chamber of Commerce in West China



Australian beef on sale at a Beijing supermarket. Trade has been hit by rising political tensions. Photo: AFP